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No. 02-750

IN THE

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY BRIEF

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INTRODUCTION

In their Brief in Opposition, Respondents Washington County and City of Tigard attempt to obscure the issue raised by Petitioner in its Petition for Certiorari. In doing so, the Respondents misstate facts and raise arguments that are both erroneous statements of law and are irrelevant to the issues pending in this matter.

I. REPLY TO COUNTER-STATEMENT OF THE CASE

A. By Its Express Terms, the TIF Ordinance is a Condition of Approval for the Issuance of a Building or Occupancy Permit.

In their counter-statement of the case, Respondents claim that the City of Tigard granted development approval to

Petitioner in September, 1996, but did not impose the traffic impact fee (TIF) until February, 1997. Res. Brief at 2. This statement is apparently made in an attempt to convince the court that payment of the TIF is not a condition for approval of a permit.

But the Respondents fail to mention that once the TIF was calculated and imposed upon Petitioner, the City refused to grant Petitioner a permit to occupy its building until such time as Petitioner paid the TIF, or made arrangements to do so. This should come as no surprise to anyone—the TIF ordinance (Section 3.17.060) expressly provides that the City will not issue a building permit until the TIF is paid, unless it is deferred. Pet. App. F at 54a. The City has the ability to defer payment of the TIF, but only until issuance of the occupancy permit, the final stage of the permitting process (Section 3.17.060(B)). In other words, before Petitioner could use its building, it had to satisfy the condition of paying the TIF, which it did.

Respondents also fail to mention that the Oregon Court of Appeals specifically held that the TIF was assessed and collected when a development permit issues. Pet. App. A at 9a.

B. The Hearings Officer's Finding that Petitioner's New Building Would Generate No Additional Traffic was an "Ordinary Factual Finding" and Has Not Been Challenged.

Respondents also claim that the Hearings Officer's unchallenged finding that Petitioner's new building would generate no additional traffic is not an "ordinary factual finding" because it was not a fact to be determined in that hearing. Res. Brief at 2 (fn.3). But of course it was.

Petitioner's challenge to the TIF was based on the failure of the TIF, as applied to Petitioner, to comply with the "rough proportionality" requirements set out by this Court in *Dolan*

v. City of Tigard, 512 U.S. 374 (1994). The Hearings Officer rejected Petitioner's argument, holding that, "although the law is less than clear," the TIF is a tax. Pet. App. E at 44a-46a. The Hearings Officer was then required to analyze the TIF ordinance language to determine whether the actual trips that a new development would generate had any relevance in the calculation of the amount of the fee.

In the course of analyzing the ordinance language, the Hearings Officer made an express finding that Petitioner's new building would generate no additional traffic. Pet. App. E at 46a. Although the Hearings Officer ultimately determined that the actual traffic generated by a development did not figure into the TIF calculation, the Hearings Officer nevertheless made a finding as to the specific amount of new traffic (zero) that would be generated by Petitioner's new building.

II. REPLY TO RESPONDENTS' SUGGESTED REASONS FOR DENYING REVIEW

A. The Decision by the Oregon Court of Appeals was Erroneous.

Respondents make a number of assertions in support of their request that this Court deny review. First, they argue that the Oregon Court of Appeals was correct in its decision. Respondents' argument on this point is fully countered in the Petition for Certiorari and in the briefs by the various amici curiae filed in this case. Respondents' argument would force this Court to draw a further distinction between various types of exactions, something that this Court has not done and that is inconsistent with *Dolan*.

B. The Tax v. Fee Distinction Respondents' Attempt to Draw is Irrelevant and Does Not Preclude Review By This Court. In Any Event, the TIF is a Fee, Not a Tax.

Respondents next argue that this Court cannot reach Petitioner's argument regarding the applicability of *Dolan* to the TIF, because the TIF is a tax that is not subject to the Takings Clause. Res. Brief at 8. There are a multitude of problems with this argument.

i. *Contrary to Respondents' Assertions, the Oregon Court of Appeals Held that the TIF was not a Tax.*

Contrary to the Respondents' assertion, the Oregon Court of Appeals held that the TIF was not a tax, finding that the TIF has characteristics of both a tax and a fee, and therefore has a "hybrid quality."[1] Pet. App. A at 12a-13a.

ii. *The Lower Courts Analyzing the Applicability of* Dolan *to Legislatively Adopted Monetary Exactions Have Not Drawn the Distinction Between Taxes and Fees.*

Despite the many courts that have considered the applicability of *Dolan* to exactions involving monetary exactions, Petitioners cite no case (nor are there any) where a lower court has analyzed the nature of the monetary exaction or made the tax/fee distinction before determining whether to apply *Dolan*.

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[1] The Oregon Court of Appeals also held that the TIF was a systems development charge under Oregon law. Pet. App. A at 9a. Specifically, the court held that the TIF was an "improvement fee" under ORS 223.299(2). A systems development charge is defined as a "reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a building permit or connection to the capital improvement." ORS 223.299(4)(a).

iii. *The TIF is not a Tax. It is a Poorly Designed Impact Fee.*

Finally, even if the distinction between a tax and a fee was relevant for purposes of the applicability of *Dolan*, the Oregon Court of Appeals rejected Respondents' assertion that the TIF is a tax (Pet. App. A at 12a-13a),[2] and the TIF would not constitute a tax under this Court's prior decisions. As this Court noted in *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), a user fee need not be precisely calibrated to the use that a party makes of government services. All that is required is that the fee approximate the cost of benefits supplied.

In this case, by its own terms, the TIF ordinance (Section 3.17.020(A)) is designed to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Pet. App. F at 47a. The amount of each individual fee calculated under the TIF ordinance is purportedly based upon the number of new traffic trips generated by a new development, which in turn necessitates traffic improvements to offset those new trips.

In other words, the TIF ordinance is designed to ensure that property owners who choose to develop their land pay a fee for the benefit (an adequate transportation system) that the City provides. The City has attempted to approximate the amount of new traffic generated by each new development in order that it charge a fee that is proportionate to the impact of each new development. By definition, that makes the TIF a user fee, not a tax.

But as applied to Petitioner, the TIF ordinance does not approximate the value of the benefits received. Since Petitioner will generate no additional traffic, there is no need

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[2] Also cf. *Scappoose Sand and Gravel, Inc. v. Columbia County*, 161 Or. App. 325, 984 P.2d 876, *rev. den.*, 329 Or. 528 (Or. 1999).

for the City to make any additional traffic improvements to maintain its existing transportation system. Hence, there is no need for Petitioner to pay a traffic impact fee. But the fact that Petitioner's $37,018 fee payment is not needed to offset Petitioner's non-existent new traffic does not mean that the TIF ordinance is a tax – it simply means that the TIF ordinance, as applied to Petitioner, violates *Dolan*. The City has simply managed to extort $37,018 from Petitioner in exchange for a development permit.

C. Payment of the TIF is Required Before Obtaining a Building or Occupancy Permit.

Respondents next claim that the imposition of the $37,018 TIF was not a condition of approval for Petitioner's development. This is contrary to the findings of the Oregon Court of Appeals, which held that the TIF "unquestionably is what in land use parlance is termed an 'impact' or 'development fee" that is charged "on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally, more intensified development to occur." Pet. App. A at 14a.

Respondents claim is also contrary to the express language of Section 3.17.060 of the TIF ordinance, which prohibits the issuance of a building or occupancy permit until the TIF has been paid. Pet. App. F at 54a.

D. The Oregon Court of Appeals, Numerous Legal Scholars, and the Only Members of This Court Who Have Written on the Issue Have Noted the Split in the Lower Courts on the Issue Presented in this Case.

Respondents also assert that the cases cited by Petitioner do not demonstrate that there is a "significant" conflict between the lower courts on the applicability of *Dolan* to

legislatively adopted monetary exactions. Res. Brief at 13-17. Apparently, Respondents are the only ones who share that opinion. In fact, the Oregon Court of Appeals expressly noted the split of authority in its opinion in this case. Pet. App. A at 22a. This echoes the commentary from the legal community. *See* Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704-06 (2000). And the only two members of this Court who have written on the issue have noted the split, and indicated that this Court should attempt to resolve it. *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting).

E. Certiorari Should Not Be Denied Simply Because the Challenged Decision is From the Oregon Court of Appeals, and not the Oregon Supreme Court.

Finally. Respondents assert that certiorari should not be granted because the challenged decision in this case was made by the Oregon Court of Appeals, and not the Oregon Supreme Court. Res. Brief at 17. But in the nearly nine years since this Court issued its opinion in *Dolan*, the Oregon Supreme Court has yet to decide a case involving the application of *Dolan*, despite a substantial body of case law on *Dolan* that has been developed by the Oregon Court of Appeals. Respondents' argument, if accepted, would essentially mean that the highest court in each state would set the docket for this Court. Obviously, that is not the case.

CONCLUSION

Petitioner (and the various amici who have filed briefs in this matter) has demonstrated a clear and unavoidable conflict in the lower courts on the applicability of *Dolan* to legislatively adopted monetary exactions. The scholarly commu-

nity, along with many lower courts and members of this Court have asked this Court to resolve the conflict. The issue is presented squarely before this Court in this case.

In addition, if this Court accepts Respondents' arguments, then *Dolan* becomes an essentially meaningless decision, as local governments will simply use excessive "one size fits all" fee exactions as a replacement for excessive real property exactions to avoid the heightened scrutiny in *Dolan*. The Takings Clause should not be ignored in this manner.

Respectfully submitted,

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